Arumugam a/l Kalimuthu v Menteri Keselamatan Dalam Negeri & Ors

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R3(2)–25–43 OF 2007
MOHAMAD ARIFF J
12 FEBRUARY 2010

Administrative Law — Judicial review — Application for — Application to quash decision by Deputy Minister of Internal Security in banning publishing of book — Whether decision by Deputy Minister illegal, procedurally improper, irrational and disproportional — Whether unreasonable restriction on right to free expression — Rules of the High Court 1980 O 53 r 3(1) — Printing Presses and Publications Act 1984 s 7(1) — Federal Constitution art 10

Administrative Law — Remedies — Certiorari — Application for — Whether decision of Deputy Minister in banning publication of book illegal, procedurally improper, irrational and disproportional — Whether court may supplant Minister's subjective decision

Constitutional Law — Executive — Deputy Ministers — Powers — Whether Deputy Minister could exercise powers of Minister — Order under s 7(1) of the Printing Presses and Publications Act 1984 signed by Deputy Minister of Internal Security — Whether order bad in law — Federal Constitution art 43A

Constitutional Law — Fundamental liberties — Freedom of speech and expression — Decision of Deputy Minister in banning publication of book on grounds of prejudice to public order — Whether limitation imposed on freedom of speech and expression justified

This application for judicial review concerned the banning of a book in the Tamil language entitled 'Mac 8', published sometime on 8 April 2006, by an order dated 21 November 2006 in exercise of power conferred under s 7(1) of the Printing Presses and Publications Act 1984 ('the Act'). The order which was published in the Government *Gazette* and signed by the Deputy Minister stated that the book was being banned for being prejudicial to public order. The order was identified as the Printing Presses and Publications (Control of Undesirable Publications) (No 15) Order 2006. The book concerned the Kampung Medan incident and contained ten accounts by the victims of the racial disturbance in that area. These accounts were reproduced with

permission from a PhD thesis available in the library of the University of Malaya. The applicant as the author of the book sought a declaratory order that the Minister's order was invalid and null and void; an order of certiorari to quash and/or set aside the Minister's order; and damages. The challenge mounted against the Minister's order was premised on the grounds of illegality, procedural impropriety, irrationality and proportionality. The applicant argued that the order, being signed by the Deputy Minister of Internal Security for and on behalf and in the name of the Minister of Internal Security, was bad in law since the powers conferred by s 7(1) of the Act was personal to the Minister and therefore cannot be exercised by the Deputy Minister. As for procedural impropriety, the applicant argued that there had been a breach of the rules of natural justice in that he was not accorded the right to be heard before the decision was made banning his book, and secondly, the respondents had failed to give reasons for the decision. The decision was said to have been made arbitrarily. As for the ground of 'irrationality', it was claimed that the contents of the book objectively cannot be properly described as being against public order. It was also argued that the Minister's order was disproportionate to the objects sought to be achieved and was an unreasonable restriction on the right to free expression as guaranteed by art 10 of the Federal Constitution of Malaysia.

Held, dismissing the application with no order as to costs:

(1) In relation to art 43A there does not appear any ambiguity in the language used. The first limb of the provision provides that the Deputy Ministers shall assist Ministers in the discharge of their duties and powers, but in the second limb the provision goes on to say that for this purpose the Deputy Ministers shall have all the powers of the Ministers. This constitutional provision is reflected in s 6(1) of the Delegation of Powers Act 1956. Further under the Ministerial Functions Act 1969 and the order made by the Yang di-Pertuan Agong thereunder, the Deputy Minister of Internal Security is expressly authorised to perform, function and exercise powers under, inter alia, the Printing Presses and Publications Act 1984. In the circumstances a Deputy Minister can exercise the powers of the Minister (see paras 13–15).

(2) The book was written on the Kampung Medan racial disturbance. That was a public order and national security issue in itself. True, major parts of the book were derived from a PhD thesis, but an academic work couched in rather sedentary and dispassionate language, and made accessible only to a select few at the university, cannot be equated with a book meant for general consumption, and targeted for the Indian community who were portrayed in the book as the victims. Objectively viewed, there were facts available for the Deputy Minister upon which he could conclude that the book would be prejudicial to public order (see para 20).

(3) In exercise of its judicial review jurisdiction, this court should not supplant the Minister's subjective satisfaction with its own, unless the bounds of legality are clearly transgressed. On the present facts, the requirements of the standards of 'illegality', 'procedural impropriety', 'irrationality' or 'proportionality' had not been satisfied to incline the court to quash the Deputy Minister's decision (see para 20).

(4) The limitation on the fundamental right conferred under art 10 is necessary in a democratic society, in the sense of meeting a pressing social need and the interference is proportionate to the legitimate aim being pursued (see para 20).

[Bahasa Malaysia summary

Permohonan untuk semakan kehakiman ini adalah berkaitan dengan pengharaman buku dalam bahasa Tamil yang bertajuk 'Mac 8', yang diterbitkan pada 8 April 2006, menerusi suatu perintah bertarikh 21 November 2006 berikutan s 7(1) Akta Mesin Cetak dan Penerbitan 1984 ('Akta'). Perintah yang diterbitkan dalam Warta Kerajaan dan ditandatangani oleh Timbalan Menteri itu menyatakan bahawa buku tersebut diharamkan kerana menjejaskan ketenteraman awam. Perintah tersebut dikenalpasti sebagai Perintah Mesin Cetak dan Penerbitan (Kawalan Hasil Penerbitan yang tak Diingini) (No 15) 2006. Buku tersebut berkenaan tragedi Kampung Medan dan mengandungi sepuluh cerita mangsa-mangsa kekacauan perkauman di kawasan itu. Cerita tersebut diterbitkan dengan kebenaran daripada tesis PhD yang terdapat di perpustakaan Universiti Malaya. Pemohon, sebagai penulis buku tersebut memohon suatu perintah perisytiharan bahawa perintah Menteri tersebut menyalahi undang-undang, batal dan tak sah; suatu perintah certiorari untuk membatalkan dan/atau mengetepikan perintah Menteri tersebut; dan ganti rugi. Persoalan terhadap perintah Menteri tersebut adalah berdasarkan alasan-alasan kepenyalahan undang-undang, ketidaksesuaian prosedur, tidak rasional dan kekadaran. Pemohon menghujah bahawa perintah tersebut, yang ditandatangani oleh Timbalan Menteri Keselamatan Dalam Negeri, untuk dan bagi pihak dan atas nama Menteri Keselamatan Dalam Negeri, adalah salah di sisi undang-undang kerana kuasa yang diberikan oleh s 7(1) Akta hanyalah kuasa khusus Menteri dan oleh itu tidak boleh dilaksanakan oleh Timbalan Menteri. Bagi ketidaksesuaian prosedur, pemohon berhujah bahawa terdapat pelanggaran kepada peraturan keadilan semulajadi yang mana dia tidak diberikan hak untuk didengar sebelum keputusan untuk mengharamkan buku tersebut dibuat, dan keduanya, responden gagal memberikan alasan-alasan untuk keputusan tersebut. Keputusan tersebut dikatakan telah dibuat sesuka hati. Berikutan alasan 'irrationality', dikatakan bahawa isi kandungan buku tersebut secara objektifnya sebenarnya tidak boleh digambarkan sebagai menggugat ketenteraman awam. Juga dihujahkan bahawa perintah Menteri tersebut tidak berkadaran dengan objektif yang

ingin dicapai dan merupakan sekatan yang tidak wajar terhadap kebebasan bersuara seperti yang dijamin perkara 10 Perlembagaan Persekutuan Malaysia.

Diputuskan, menolak permohonan tanpa perintah untuk kos:

(1) Berkaitan perkara 43A, tiada kesamaran dalam bahasa yang digunakan. Bahagian pertama peruntukan tersebut memperuntukkan bahawa Timbalan-Timbalan Menteri mesti membantu Menteri-Menteri dalam perlaksanaan tugas dan kuasa mereka, tetapi dalam bahagian kedua, peruntukan tersebut menyatakan bahawa bagi tujuan itu, Timbalan-Timbalan Menteri mestilah mempunyai kesemua kuasa Menteri-Menteri. Peruntukan perlembagaan ini termaktub dalam s 6(1) Akta Perwakilan Kuasa 1956. Selanjutnya, di bawah Akta Tugas-Tugas Menteri 1969 dan juga perintah yang dibuat oleh Yang di-Pertuan Agong, Timbalan Menteri Keselamatan Dalam Negeri dengan jelas diberi kuasa untuk melakukan, bertindak dan menjalankan kuasa-kuasa di bawah, antara lain, Akta Mesin Cetak dan Penerbitan 1984. Dalam keadaan ini, seorang Timbalan Menteri boleh melaksanakan kuasa-kuasa Menteri (lihat perenggan 13–15).

(2) Buku tersebut berkaitan kekacauan perkauman di Kampung Medan. Itu merupakan isu ketenteraman awam dan keselamatan negeri. Memang benar bahawa sebahagian besar buku tersebut adalah daripada tesis PhD, tetapi suatu penulisan akademik yang ditulis secara bersahaja dan hanya boleh dibaca oleh beberapa orang di universiti tersebut, tidak boleh disamakan dengan buku yang diedarkan kepada umum; dan ditujukan kepada komuniti India yang digambarkan sebagai mangsa dalam buku tersebut. Dilihat secara objektif, terdapat fakta-fakta tersedia untuk Timbalan Menteri yang membolehkannya memutuskan bahawa buku tersebut menjejas ketenteraman awam (lihat perenggan 20).

(3) Dalam menjalankan bidang kuasa semakan kehakimannya, mahkamah ini tidak harus menggantikan keputusan subjektif Menteri dengan keputusannya, melainkan batasan perundangan dengan jelas telah dilanggar. Atas fakta-fakta, keperluan bagi standard 'illegality', 'procedural impropriety', 'irrationality' atau 'proportionality' tidak dipenuhi bagi membolehkan mahkamah membatalkan keputusan Timbalan Menteri (lihat perenggan 20).

(4) Pembatasan bagi hak asasi di bawah perkara 10 adalah perlu dalam masyarakat demokrasi, bagi memenuhi keperluan sosial yang mendesak dan halangan tersebut adalah berkadaran bagi mencapai tujuan yang munasabah (lihat perenggan 20).]

Notes

For cases on application for judicial review, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 191–197.

For cases on certiorari, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 231–469.

For cases on executive in general, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2025–2034.

For cases on freedom of speech and expression, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2107–2125.

Cases referred to

Chor Phaik Har v Farlim Properties Sdn Bhd [1994] 3 MLJ 345; [1994] 4 CLJ 285, FC (refd)

Clang Suan Tze v The Minister of Home Affairs & Ors and other appeals [1989] 1 MLJ 69; [1988] 1 LNS 162, CA (refd)

Council of Civil Service Unions & Ors v Minister for the Civil Service [1984] 3 All ER 935, HL (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ 1, FC (refd)

Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals [2002] 4 MLJ 449; [2002] 4 CLJ 309, FC (refd)

Nadarajan v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor and other applications [1994] 2 MLJ 657; [1994] 4 CLJ 728, HC (refd)

R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532, HL (refd)

SIS Forum (Malaysia) v Dato' Seri Syed Hamid bin Syed Jaafar Albar (Menteri Dalam Negeri) [1996] 3 MLJ 611, HC (refd)

Su Yu Min v Ketua Polis Negeri & Ors [2005] 6 MLJ 768; [2005] 3 CLJ 875, HC (refd)

Wong Fook Nyen v Timbalan Menteri Dalam Negeri, Malaysia & Ors [1988] 2 CLJ 543 (Rep), HC (refd)

Legislation referred to

Delegation of Powers Act 1956 s 6(1)
Federal Constitution arts 10, 43A, 43A(2)
Internal Security Act 1960 s 73(1)
Ministerial Functions Act 1969
Printing Presses and Publications Act 1984 s 7(1)
Rules of the High Court 1980 O 53 r 5

Edward Saw (K Shanmuga, Amer Hamzah Arshad, Edmund Bon and Joanne Leong with him) (Chooi & Co) for the appellant.

Azizah Nawawi (Nadia Tajuddin and Nizam Zakaria with her) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Mohamad Ariff J:

[1] This application concerns the banning of a book in the Tamil language entitled 'Mac 8' published sometime on 8 April 2006, which book was banned by an order dated 21 November 2006 in exercise of power conferred under s 7(1) of the Printing Presses and Publications Act 1984. This order was published in the Government *Gazette* dated 28 December 2006. This particular order was signed by the Deputy Minister and according to it the book was banned for being 'prejudicial to public order'. The order is identified as Printing Presses and Publications (Control of Undesirable Publications) (No 15) Order 2006.

[2] The applicant is the author of this book.

[3] By this judicial review application, the applicant seeks the following orders and reliefs:

(a) declaratory order that the Minister's order is invalid and null and void;

(b) an order of certiorari to quash and/or set aside the Minister's order; and

(c) damages under O 53 r 5 of the Rules of the High Court 1980.

[4] According to the applicant's version of the facts, he came to know of the banning of the book only by reading an online news article in *Malaysiakini.com* sometime on 19 January 2007. He discovered about the gazetting only on or about 24 January 2007.

[5] The challenge mounted against the Minister's order is premised on four grounds, namely illegality, procedural impropriety, irrationality and proportionality, the grounds as stated in *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1984] 3 All ER 935, and accepted in Malaysia in such cases as *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1. By way of summary, the applicant argues that the order, being signed by the Deputy Minister of Internal Security for and on behalf and in the name of the Minister of Internal Security, is bad in law, being evidence of a fatal procedural defect. The powers conferred by s 7(1) of the Act is personal to the Minister and therefore cannot be exercised by the Deputy Minister. There was no evidence of the Minister's personal satisfaction as a condition precedent or jurisdictional fact. It was strongly argued in this connection that the s 7 power can never be delegated. The case will be different if the satisfaction of the mind is of the Minister but the act of signing the order is done by the Deputy Minister. However, the applicant's counsel submitted

there was no evidence of this personal satisfaction by the Minister himself. This argument touches on the ground of illegality. As for procedural impropriety, the applicant argues there has been a breach of the rules of natural justice in that he was not accorded the right to be heard before the decision was made banning his book, and secondly, the respondents had failed to give reasons for the decision. The decision is argued as having been made arbitrarily. As for the ground of 'irrationality', looking at the contents of the book objectively, it cannot be properly described as being against public order. Indeed, it was argued, if read and understood properly, the book will be seen as promoting public order. As regards the 'proportionality' ground, it is argued that the Minister's order was disproportionate to the objects sought to be achieved and was an unreasonable restriction on the right to free expression as guaranteed by art 10 of the Federal Constitution of Malaysia.

[6] In the course of submission, the translation of the book was furnished to this court and appears as exh AS1. Counsel for the applicant explained that the book concerns the Kampung Medan incident. It contains ten accounts by the victims of this racial disturbance in the area. These accounts were reproduced with permission from a PhD thesis available in the library of the University of Malaya. The book gives an account of the events preceding the attacks, an account of two incidents which the applicant believes have caused the clashes and it narrates the first incident which eventually led to the racial disturbance. All these are produced from parts of the PhD thesis. Thereafter the book traces the history of Kampung Medan and its economic development over time, followed by the author's comments and criticisms. In the final part of the book, translated into Bahasa Malaysia as 'pengajaran', the author submits on the lessons to be learnt from the whole incident, and in the closing paragraph it calls for elimination of all forms of discrimination. It is therefore argued by counsel for the applicant that if the book is read in totality, it cannot fall anywhere near what can be deemed to be an undesirable publication, or as being against public order. In totality, the book is a reasoned criticism of government policy and has to be viewed as part of normal political discourse. As such, the decision to ban the book on the ground of public order has to be regarded as irrational.

[7] It will be pertinent to examine closely the statutory formula under s 7(1) of the Act, and this provision reads as follows:

> If the Minister is satisfied that any publication contains any article, caricature, photograph, report, notes, writing, sound, music, statement or any other thing which is in anyway prejudicial to or likely to be prejudicial to public order ... he may in his absolute discretion by order published in the *Gazette* prohibit, either absolutely or subject to such conditions as may be prescribed, the printing,

A importation, production, reproduction, publishing, sale, issue, circulation, distribution or possession of that publication.

[8] I emphasise the words 'if the Minister is satisfied' and 'he may in his
B absolute discretion by order'. The statutory language used prima facie suggests the power being vested personally in the Minister.

[9] Turning to the arguments for the respondents, the affidavit in reply affirmed by Dato' Fu Ah Kiow, who was at the material time the Deputy
C Minister, states that the width of jurisdiction of the first respondent (the Minister himself) and the second respondent (the Deputy Minister) is determined by the Constitution and the statute, and to that extent the averment of the applicant that only the Minister could exercise the discretionary power under s 7 was expressly denied. The then Deputy
D Minister states:

> 13. Saya telah meniliti syor dan ulasan yang dikemukakan oleh Bahagian Kawalan Penerbitan dan Teks Al Quran dan sebelum memutuskan untuk melarang penerbitan buku pemohon, saya telah mempertimbangkan perkara-perkara yang
E berikut:
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> 13.1.Terdapat laporan dan aduan yang dikemukakan oleh ibu pejabat polis berdasarkan kajian mengenai kesan buku pemohon terhadap keharmonian kaum dan keselamatan Negara dan ketenteraman awam yang boleh meracuni fikiran dan minda orang awam yang membaca khususnya kaum
F India yang membaca buku Pemohon yang diterbitkan dalam Bahasa Tamil sahaja.
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> 13.2.Bahagaian Kawalan Penerbitan dan Teks Al Quran juga telah mengkaji isi kandungannya dan mendapati buku pemohon menyiarkan isu-isu perkauman yang boleh memudaratkan ketenteraman awam dan
G keselamatan Negara.
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> 13.3.Saya telah mempertimbangkan kajian yang dikemukakan kepada saya dan pada 21 November 2006 saya telah bersetuju dengan syor yang dikemukakan. Memandangkan ini merupakan isu keselamatan Negara maka ia hendaklah ditangani dengan segera.
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> 13.4.Tindakan yang saya ambil untuk mewartakan buku pemohon sebagai buku yang dilarang pencetakan dan penerbitannya. Tindakan ini adalah selaras dengan bidang kuasa yang diberikan kepada saya bagi mengelakkan kejadian serupa dengan kejadian Kampung Medan dari berulang dan lebih ramai omag awam diracuni fikiran mereka oleh kata-kata yang ditulis dalam
I buku Pemohon.

[10] It is abundantly clear from this affidavit in reply that the subjective satisfaction exercised was that of the Deputy Minister, not the Minister

himself. Exercising that subjective satisfaction, the Deputy Minister stated that he was satisfied it was necessary to *Gazette* the book as an undesirable publication after considering the advice and report received from the police headquarters (relying on studies conducted on the effects of the book on race relations, public order and national security), as well as the advice from Bahagian Kawalan Penerbitan dan Teks Al-Quran which had also studied the contents of the book and found that the book published racial issues that could prejudice public order and national security.

[11] Since it is clear that it was the Deputy Minister who was the decision maker, the initial issue of whether the subjective satisfaction of the Minister under s 7(1) of the Act can be delegated to the Deputy Minister has first to be determined. In the course of argument, counsel for the applicant stated that he was mindful that there were numerous decisions in Malaysia in favour of the position that the powers of the Minister can be exercised by the Deputy Minister. Nevertheless counsel argued that in all these cases no reference was made to the explanation given by the government when moving the amendment to the Federal Constitution to include art 43A. Article 43A(2), which is the relevant part for our purposes, reads:

> (2) Deputy Ministers shall assist Ministers in the discharge of their duties and functions, and for such purpose shall have all the powers of Ministers.

[12] The argument taken on behalf of the applicant was on the basis that 'assist' cannot be taken to mean 'assume'. In other words, a Deputy Minister while he can assist the Minister in carrying out the Minister's functions cannot himself assume the full width of power of the Minister. Reference was made to the *Hansard*, in which the following explanation from the then Prime Minister, Dato' Seri Dr Mahathir Mohamad, when moving on the amendment Bill during the second and third reading, appears:

> Pindaan ini akan membolehkan Timbalan Menteri dan Setiausaha Parlimen dengan arahan Menteri, mengemukakan Rang Undang-Undang tertentu dalam Dewan Rakyat dan Dewan Negara apabila Menteri berkenaan tidak dapat menjalankan tugasnya kerana sesuatu sebab. Ini tidak bermakna Timbalan Menteri dan Setiausaha Parlimen berkuasa seperti Menteri dan boleh mengganti Menteri dalam Jemaah Menteri atau mengendalikan tugas-tugas yang dihadkan kepada Menteri (at pp 8555–8556, *Penyata Rasmi Parlimen*, 1 August 1983).

[13] The law permits reference being made to *Hansard* as an aid to interpretation and to assist to resolve any ambiguity in the statute. See *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345; [1994] 4 CLJ 285. Nevertheless, in relation to art 43A there does not appear any ambiguity in the language used. True enough in the first limb of the provision it provides Deputy Ministers shall assist Ministers in the discharge of the duties and

powers, but in the second limb the provision goes on to say that for this purpose the Deputy Ministers shall have all the powers of the Ministers. This constitutional provision is reflected in s 6(1) of the Delegation of Powers Act 1956 and which provides:

> Subject to section 11 and of any written law expressly to the contrary all acts, orders or directions which could lawfully be done or given, in the exercise of any power or in the performance of any duty conferred or imposed by any written law, by a Minister ... may, subject to any directions given by him be validly and effectually done or given on his behalf and in his name by any officer under his administrative control and expressly or impliedly authorised by him generally or specially thereto or in the case of a Minister be done or given on his behalf and in his name by a Deputy Minister.

[14] Further under the Ministerial Functions Act 1969 and the order made by the Yang di-Pertuan Agong thereunder, the Deputy Minister of Internal Security is expressly authorised to perform, function and exercise powers under, inter alia, the Printing Presses and Publications Act 1984. See the Ministers of the Federal Government (No 2) Order 2004 and the Ministers of the Federal Government (Amendment) (No 2) Order 2006.

[15] In the circumstances and bearing in mind these various interlocking constitutional and statutory provisions, I see no valid or compelling reason to depart from the approach taken in the series of cases which have stated the view that a Deputy Minister can exercise the powers of the Minister. See the cases of *Nadarajan v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor and other applications* [1994] 2 MLJ 657; [1994] 4 CLJ 728; *Su Yu Min v Ketua Polis Negeri & Ors* [2005] 6 MLJ 768; [2005] 3 CLJ 875 and *Wong Fook Nyen v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [1988] 2 CLJ 543 (Rep).

[16] Since this court has taken the view that the Deputy Minister can exercise the powers of the Minister under s 7 for and on his behalf in the fullest sense, it remains to be considered whether the exercise of power was validly made. The s 7(1) power is couched as subjective discretionary power. It speaks of 'he may in his absolute discretion' decide to prohibit the publication or circulation or distribution of a book on the ground of being prejudicial to public order. The preponderance of authority presently leans in favour of requiring the courts to ascertain whether objectively viewed that subjective satisfaction has been exercised properly in law, particularly where fundamental rights are in issue. See, for example, *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals* [2002] 4 MLJ 449; [2002] 4 CLJ 309 (following *Clang Suan Tze v The Minister of Home Affairs & Ors and other appeals* [1989] 1 MLJ 69; [1988] 1 LNS 162) where it was held, inter alia, although the court will not question the executive's decision as to what

national security requires, yet it may and will examine whether the executive decision is in fact based on consideration of national security (this was said in the context of s 73(1) of the Internal Security Act 1960).

[17] Recently, I have had occasion to review two important Supreme Court decisions bearing on this issue in the case of *SIS Forum (Malaysia) v Dato' Seri Syed Hamid bin Syed Jaafar Albar (Menteri Dalam Negeri)* [1996] 3 MLJ 611.

[18] In that decision I had stated the following:

> As accepted by both parties, the discretion exercised by the honourable Minister is open to an objective assessment by this court in order to determine whether the precondition for its exercise has been satisfied on the facts. The decision of the Minister is, by our jurisprudence, not to be regarded as final although the statutory formula may appear to indicate so. Here, as in other provisions, the discretion is to be exercised is stated as being in the honourable Minister's 'absolute discretion'. But it must still stand the test of whether it has been properly exercised in law, since the question whether the decision has been taken on the ground of public order is a question of law. See *Merdeka University Berhad v Government of Malaysia* where it was stated the correct view is 'for an objective approach to the formula to be preferred and this means that the discretion would be reviewable and the deciding authority has in fact to have reasonable grounds and it is insufficient if he merely thinks he has reasonable grounds'. This approach has been further emphasised by the Federal Court very recently in *Darma Suria bin Risman Saleh v Menteri Dalam Negeri, Malaysia & Ors* [2010] 3 MLJ 307, where it is said:
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> > Applying this test which apart from being binding precedent Is the correct statement of the law, in the present instance it is insufficient if the Minister thought he had reasonable grounds to be satisfied that the appellant had acted in a manner prejudicial to public order. The question that a court must ask Itself is whether a reasonable Minister apprised of the material set out in the statement of facts would objectively be satisfied that the actions of the appellant were prejudicial to public order.

In the course of submission, I was referred to another recent decision of the Federal Court, namely *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333. The highest court in the land has stated in no uncertain terms that 'the fundamental liberties guaranteed under Part II must be generously interpreted and that a prismatic approach to interpretation must be adopted'. The Federal Court further stressed that 'provisos or restrictions that limit or derogate from a guaranteed right must be read restrictively'. In the context of art 10, such as the case here, 'restrictions' must be read as qualified by the word 'reasonable'. The Federal Court opined:

> Now although the article says 'restrictions', the word 'reasonable' should be read into the provision to qualify the width of the proviso. The reasons for reading the derogation as 'such reasonable restrictions' appear in the judgment of the Court of Appeal in *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213; [2007] 1 CLJ 1 which reasons are now adopted as part of this judgment.

The Federal Court has now determined that the rights guaranteed by Part II which are enforceable by the courts of law, 'form part of the basic structure of the Federal Constitution'. It has also categorically stated that provisions of the Constitution 'must be interpreted in keeping with the doctrine of procedural and substantive fairness housed in art 8(1)'. It must additionally 'meet the test of proportionality'. Given its immediate relevance to our case here, I quote the pertinent passage in the Federal Court judgment (para 19):

> ... when state action is challenged as violating a fundamental right, for example, the right to livelihood or the personal liberty to participate in the governance of the Malaysian Bar under art 5(1), art 8 will at once be engaged. When resolving the issue, the court should not limit itself within traditional and narrow doctrinaire limits. Instead. It should ask itself the question: is the state action alleged to violate a fundamental right procedurally and substantively fair. The violation of a fundamental right where it occurs in consequence of executive or administrative action must not only be in consequence of fair procedure but should also in substance be fair, that is to say, it must meet the test of proportionality housed in the second, that is to say, the equal protection limb of art 8(1).

These are wide pronouncements of the Federal Court binding on this court, and therefore, with due deference to precedent, I have to approach this present case on the same basis. Can it therefore be said, on the facts of this case, and applying the approach of reading encroachments on fundamental liberties restrictively, the honourable Minister has applied procedural and substantive fairness and acted with proportionality?

[19] Consistency demands that I adopt the same standards and tests, but placed against the factual matrix of this current application. Facts will naturally differ from case to case. On the facts of this present case, can it be said that objectively viewed, the Deputy Minister's exercise of subjective satisfaction is procedurally or substantively flawed in law? The question posed in *Darma Suria bin Risman Saleh* then become highly pertinent: 'The question that a court must ask itself is whether a reasonable Minister apprised of the material set out in the statement of facts would objectively be satisfied that the actions of the appellant were prejudicial to public order.'

[20] This present book was written on the Kampung Medan racial disturbance. That is a public order and national security issue in itself. True, major parts of the book are derived from a PhD thesis, but an academic work couched in rather sedentary and dispassionate language, and made accessible only to a select few at the university, cannot be equated with a book meant for general consumption, and targeted for the Indian community who are portrayed in the book as the victims. This court has to be also mindful of the social and cultural sensitivities of the respective communities in Malaysia and balance it against the need to preserve and protect human rights. Both the statutory and constitutional framework has to be objectively balanced against these sensitivities. In the final analysis, it has to asked and answered whether

there were materials before the Deputy Minister on which he could decide as he did in exercise of the statutory objectives of the Act. Objectively viewed, I am of the view there were facts available for the Deputy Minister upon which he could conclude that the book would be prejudicial to public order. In exercise of its judicial review jurisdiction, this court should not supplant the Minister's subjective satisfaction with its own, unless the bounds of legality, in the sense explained above, are clearly transgressed. On the facts of this instant application, I do not believe the requirements of the standards of 'illegality', 'procedural impropriety', 'irrationality' or 'proportionality' have been satisfied to incline this court to quash the Deputy Minister's decision. On the facts of this case, the limitation on the fundamental right conferred under art 10 is 'necessary in a democratic society, in the sense of meeting a pressing social need' and 'the interference (is) proportionate to the legitimate aim being pursued', according to the standards stated in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 (per Lord Steyn at p 548).

[21] In the circumstances, I am dismissing this application for judicial review, but I make no order as to costs since this application concerns a matter of public interest.

Application dismissed with no order as to costs.

Reported by Kanesh Sundrum